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No. 262.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1935.

LOUIS J. BECKER, Collector of Internal Revenue,
Petitioner,

v.

ST. LOUIS UNION TRUST COMPANY, a Corporation, and WILLIAM EDWIN GUY, Executors of the Estate of WILLIAM EVANS GUY, Deceased,
Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENTS.

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BRIEF FOR RESPONDENTS.

OPINIONS BELOW.

The opinion of the District Court (R. 16) is not officially reported. The opinion of the Circuit Court of Appeals (R. 124) is reported in 76 Fed. (2) 851.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered March 13, 1935, and a petition for rehearing was denied April 19, 1935 (R. 145). The petition for certiorari was filed July 19, 1935, and was granted October 14, 1935. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

The decedent executed four identical declarations of trust naming one of his four children as beneficiary in each, by which he declared that he held in trust for the beneficiary the property therein described. Each trust instrument provided that if the beneficiary should die before the settlor the trust property should revert to the settlor and become his immediately and absolutely; or, if the settlor should die before the beneficiary, then the trust property should become the beneficiary's immediately and absolutely, and, in either case, the trust should cease. The question presented is:

> Whether the property so transferred in trust by the decedent should be included in his gross estate because the transfer (a) was made in contemplation of death, or (b) was intended to take effect in possession and enjoyment at or after his death within the meaning of Section 302 (*c*) of the Revenue Act of 1926.

STATUTE INVOLVED.

Revenue Act of 1926, c. 27, 44 Stat. 9:

> Sec. 302. The value of the gross estate of the

decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death;

* * * * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possesion or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

* * * * * * *

(h) Except as otherwise specifically provided therein, subdivisions (b), (c), (d), (e), (f) and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this act.

* * * * * * *

(U. S. C., Title 26, Sec. 1094.)

STATEMENT.

For a statement of the case, we quote from the opinion of the Circuit Court of Appeals (R. 124):

The facts—as to which there is virtually no dispute—are as follows:

William Evans Guy, on January 3, 1921, executed four separate written declarations of trust, one for each of his four children, who at that time had reached their major-

ity. By each of the trust instruments he conveyed to himself, as trustee, certain securities of the par value of $72,000, the aggregate value of the securities at that time being $288,000. From time to time thereafter he made additions to these trusts, and at the time of his death on July 24, 1928, the total value of the trust property included in the four trusts was $994,195. This amount the Commissioner of Internal Revenue included as a part of the gross estate of the decedent, under Revenue Act of 1926, Section 302 (26 U. S. C., Sec. 1094), and the appellants, his executors, after paying the additional estate tax which resulted, brought this action to recover it.

The four declarations of trust were identical, with the exception of the name of the beneficiary. The declaration of trust for Evelyn S. Guy is typical of each of the trusts, and, so far as pertinent, is as follows:

> "I, William Evans Guy, of the City of St. Louis, and State of Missouri, hereby declare, this third day of January, 1921, that I hold in trust for my daughter, Evelyn S. Guy, the following property, to wit:"
>
> (Here follows description of securities);
>
> "with the powers and for the uses and purposes hereinafter set forth, as follows:
>
> "1. I am to have the power at any time, and from time to time, to sell any of the trust property or estate, *for such price and prices as I may determine.* Any money coming into my hands as the proceeds of any such sale or otherwise and forming a part of the principal of said trust estate shall as soon as practicable, be reinvested by me. In making such investments, I am to have full power to purchase any property, real or personal, which I may think desirable to acquire or hold as part of the said trust estate, and I am not to be restricted to the purchase of such property as is

ordinarily deemed advisable for trust property. I am likewise to have the power to rent or lease any and all real estate which may be included in said trust property for terms of any duration, whether such terms shall extend to a time beyond the termination of this trust or not. I am likewise to have full power and authority in my discretion to borrow money and secure the sums so borrowed by pledge or mortgage of any and all portions of said trust estate and I may out of the corpus or income of said trust estate, or out of both such corpus and income repay the sums so borrowed. I am to have full authority to invest or reinvest any sums so borrowed; and to collect and receive the rents, income and profits arising from the trust estate therein created. It being my intention to retain *as trustee* [italics ours] such rights, power and authority in respect to the management, control and disposition of said trust estate for the use and benefit of the beneficiary, as I have with respect to property absolutely owned by me.

"2. Out of the income and revenue accruing from said trust estate I shall have power to pay all taxes, expenses necessarily or properly incident to its care, preservation and management; and all other reasonable or necessary charges incident to the administration of the trust created hereby, and out of the remaining income and revenue, I am to pay the beneficiary of this trust an allowance of $300.00 a month, with power in my discretion from time to time to increase or decrease the said allowance whenever I may deem it to be to the best interest of the said beneficiary, to have such allowance increased or decreased. I shall have the power, from time to time, out of the remainder of said income and revenue, to appropriate and pay such sums as I may deem reasonably necessary for the maintenance, support and education of said beneficiary. Any income not distributed as

hereinabove provided shall be added to the principal of the trust estate.

"3. In case of an emergency, or illness of said beneficiary, requiring a greater sum than that accruing as income of revenue, I shall have the power to use as much of the principal of said trust estate as may be absolutely necessary.

"4. Any receipt given by the beneficiary of this trust to me for any sum paid to her by me, shall be a full acquittance and discharge for the payment mentioned in such receipt.

"5. The foregoing provisions for my said daughter, Evelyn S. Guy, shall be for her sole and separate use, free from all statutory and marital rights of her husband; and free from her debts and without the right on her part to assign, pledge, hypothecate, or anticipate, or in any way create a lien upon any of the income or corpus of the trust estate hereby created before she shall receive the same, nor shall any of the said income or corpus be subject to any claims of any persons who may at any time be creditors of my said daughter.

"6. (a) If the said beneficiary should die before my death, then this trust estate shall thereupon revert to me and become mine immediately and absolutely, or (b) if I should die before her death, then this property shall thereupon become hers immediately and absolutely and be turned over to her and in either case this trust shall cease."

(Signed) William Evans Guy.

Witness:

Wm. Edwin Guy."

In 1921, at the time these trusts were made, Mr. Guy was 76 years of age. Long prior to that time he had retired from the active management of any corporations in

which he was interested, but he conducted his own affairs, which were extensive, and continued as a director of the St. Louis Cold Storage Company, the Laclede Steel Company, and as trustee and director in several syndicates. He maintained a downtown office, where he went every business day when the weather was good, from September to June, which was the portion of the year that he spent in St. Louis. He took an active interest in all matters with which he was connected. He made a practice of consulting his physician on an average of about once in six months, and enjoyed almost perfect health for a man of his years. He had not consulted his physician for some time prior to the date of the execution of the trusts, so far as the physician could remember. In June, 1928, about two months prior to his death, he had had a physical examination, which disclosed no change in his condition. He was an optimistic and cheerful man, and exceptionally alert mentally. He came of a long-lived family, and frequently had made the statement that he expected to live to be at least ninety. It seems that two of his immediate ancestors had lived beyond that age. None of his friends knew of any ailment which might have led him to suspect that his death was to be expected in the near future. He was careful of his health, but obviously not concerned about death. In fact, the evidence indicates that he was, at the time these trusts were executed, in as good physical and mental condition as possible for any man of his years. His purpose in making the four trusts, as expressed to his son (who drafted the instruments) and to at least one of his friends, was to make his children independent of him, to enable them to know what they might expect each year, in lieu of an allowance out of his own income, and to avoid the high surtax which would be imposed upon his income if he retained his property for himself.

The action was tried to the court below without a jury. Two questions were presented:

1. Was the transfer of the property included in these four trusts intended to take effect in possession or enjoyment at or after death?

2. Were the transfers made in contemplation of death?

The court below found that none of the beneficiaries named in the trust instruments acquired custody, control or title to the corpus of the trust prior to the death of the settlor; that the title of the beneficiaries was contingent upon their survival of the settlor; and that the motive for the creation of the trusts was to decrease the settlor's income taxes by distributing the property and thus avoiding the high rate for large incomes, and at the same time to make provision for the distribution of the property included in the trusts at the settlor's death. The Court concluded that the corpus of the trusts was transferred in contemplation of death, that the transfers were intended to take effect in possession and enjoyment at and after death, and that the value of the trust property was therefore properly included in the gross estate.

The Circuit Court of Appeals held that the transfers were not intended to take effect in possession or enjoyment at or after the death of testator and that there was no evidence to support the conclusion of the trial court that the corpus of the trusts was transferred in contemplation of death.

SUMMARY OF ARGUMENT.

I.

The Circuit Court of Appeals correctly ruled that there was no evidence that the trusts were created in contemplation of death. The provision in each instrument relating to distribution of the trust property at decedent's death did not afford such evidence. Similar provisions have been held repeatedly not to make the instruments containing them testamentary in character.

II.

The trusts were not intended to take effect at or after decedent's death.

(a) The tax imposed by Section 302 (c) of the Revenue Act of 1926 is a transfer tax upon the transmission of property from the dead to the living as distinguished from a succession tax upon the right of the living to receive property from the dead. It is not the interest to which a person succeeds upon the death of another but the interest of the decedent which ceases by reason of death which is the subject of the tax.

(b) The instruments in question effected complete and irrevocable gifts in praesenti and completely divested the decedent of all beneficial interest in the trust property. They created determinable fees in the respective beneficiaries, the enjoyment, but not the interest, being postponed until the expiration of the trust period, and after their execution the decedent's only interest was a bare possibility of reverter.

(c) Although not decisive, it may be noted that neither the postponement of actual possession nor the provision

for the accumulation of income nor the fact that the interest of the beneficiary might be divested if his death occurred prior to that of the grantor prevented the interests of the respective beneficiaries from vesting upon the execution of the instruments.

(d) It is established by the controlling decisions of this Court, namely, May v. Heiner, 281 U. S. 238, and McCormick v. Burnet, 283 U. S. 784, that the obliteration by the decedent's death of the possibility of reverter which was lodged in him was not the occasion of the transfer of any interest in the property from the decedent to the beneficiary, nor did it constitute such a shifting of economic benefits by reason of death as will render the corpus of the trust estate subject to estate taxes.

(e) The present case is distinguished from the case of Klein v. United States, 283 U. S. 231, and Commissioner v. Schwarz, 74 Fed. (2) 712, by the fact that in those cases only a life estate was presently granted with provision for transfer of the reversion upon the happening of a condition precedent, whereas here a fee was presently granted, subject to be defeated by a condition subsequent; this distinction is emphasized by the fact that in those cases only the value of the property after deducting the value of the life estate so granted was included in the gross estate of the decedent, whereas the value of the entire trust property is here sought to be so included.

(f) The fact that immediately after this Court decided the cases of Burnet v. Northern Trust Company, 283 U. S. 782; Morsman v. Burnet, 283 U. S. 783, and McCormick v. Burnet, 283 U. S. 784, Congress amended the Revenue Act of 1926 so as to tax specifically transfers where the decedent retained the income from the trust property for life or the power to direct who should receive the income

from the property, but made no effort to bring transfers in which there was a possibility that the trust property might revert to the grantor within the specific provisions of the act is persuasive evidence that Congress has never intended to tax transfers of the latter type as being intended to take effect at death.

(g) The question presented is not whether Congress has power to tax transfers of the nature here involved, but whether the present transfers can be characterized as intended to take effect in possession and enjoyment at or after grantor's death. Any doubt that the present transfers come within that category is to be resolved in favor of the taxpayer.

ARGUMENT.

CONTEMPLATION OF DEATH.

In his petition for certiorari petitioner urged that the provisions in each trust instrument relating to the distribution of the trust property at the death of the decedent afford evidence to support the conclusion of the trial court that the trusts were created in contemplation of death and that the court below erred in finding to the contrary. It is respectfully submitted that this contention is without merit upon the authority of

Helvering v. Duke, 290 U. S. 591;
Reinecke v. Northern Trust Company, 278 U. S. 389;
May v. Heiner, 281 U. S. 238;
McCaughn v. Carnill, 43 Fed. (2) 69 (C. C. A. 3), certiorari denied 283 U. S. 825;
Hodgkins v. Commissioner, 44 Fed. (2) 43 (C. C. A. 7), certiorari denied 283 U. S. 825;
Burnet v. Northern Trust Company, 283 U. S. 782;
Morsman v. Burnet, 283 U. S. 783;
McCormick v. Burnet, 283 U. S. 784;
In re Estate of Soulard, 141 Mo. 642, l. c. 664, 43 S. W. 617.

The trusts involved in all of these cases contained similar provisions and in all of the Federal cases it was either expressly held or stipulated that the trusts were not testamentary in character and were not created in contemplation of death, and in the Missouri case it was held that the trust was not testamentary in character.

THE TRUSTS WERE NOT INTENDED TO TAKE EFFECT AT OR AFTER THE DECEDENT'S DEATH.

Nature of Tax Involved.

The tax imposed by Section 302 (c) of the Revenue Act of 1926 is a transfer tax upon the net estate of the decedent which passed from the decedent to living persons by reason of decedent's death. It is a tax upon the right to transmit property by death, as distinguished from an inheritance or succession tax upon the right of the living to receive property from the dead. It is the cessation of the interest of the decedent and the transmission of that interest to the living, rather than the receipt of property by the living from the dead, which is the subject of the tax.

In Young Men's Christian Association v. Davis, 264 U. S. 47, 44 S. Ct. 291, 68 L. Ed. 558, this Court says, l. c. 50:

> "What was being imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeed on death, but the interest which ceased by reason of the death (Knowlton v. Moore, 178 U. S. 41, 48, 49)."

In Edwards v. Slocum, 264 U. S. 61, l. c. 62, 44 S. Ct. 293, 68 L. Ed. 564, the same Court says:

> "But this is not a tax upon a residue; it is a tax upon a transfer of his net estate by a decedent, a distinction marked by the words that we have quoted

from the statute, and previously commented upon at length in Knowlton v. Moore, 178 U. S. 41, 49, 77. It comes into existence before and is independent of the receipt of the property by the legatee. It taxes, as Hanson, Death Duties, puts it in a passage cited in 178 U. S. 49, 'not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death.' "

In Reinecke v. Northern Trust Company, 278 U. S. 339, 49 S. Ct. 123, 73 L. Ed. 410, the same Court says, l. c. 348:

"In the light of the general purpose of the statute and the language of section 401, explicitly imposing the tax on net estate of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in section 402 (c), 'to take effect in possession or enjoyment at or after his death,' include any others than those passing from the possession, enjoyment or control of the donor at his death, and so taxable as transfers at death under section 401. That doubt must be resolved in favor of the taxpayer."

In the dissenting opinion of Roberts, J., in Coolidge v. Long, 282 U. S. 582, 51 S. Ct. 306, 75 L. Ed. 562, the Justice says, l. c. 609:

"Since no one has the natural right, either to own property or to transfer it to others at his death, but derives the power so to do solely from the state, the sovereignty may tax the owner for the privilege of transmission conferred by law (United States v. Perkins, 163 U. S. 625). The right to receive and enjoy that which was formerly owned by another is similarly derived, and upon like principles the sovereignty may tax the taker for the privilege accorded. (Citing cases.) So distinct are those privileges that

either or both may be taxed as respects the same property. (Citing cases.)

"The one is collected on a transfer of his estate by the decedent; it taxes not that to which some person succeeds upon a death, but that which succeeds by reason of death (Nichols v. Coolidge, 274 U. S. 531, l. c. 537; Edwards v. Slocum, supra). The other is laid upon the right to become beneficially entitled to property on the death of its former owner."

In Nichols v. Coolidge, 274 U. S. 531, 537, 47 S. Ct. 710, 71 L. Ed. 1184, the foregoing quotations from Edwards v. Slocum, supra, and Young Men's Christian Association v. Davis, supra, are quoted with approval.

In Ithaca Trust Company v. United States, 279 U. S. 151, l. c. 155, 49 S. Ct. 291, 73 L. Ed. 647, this Court, speaking through Mr. Justice Holmes, said:

"The tax is on the act of the testator, not on the receipt of property by the legatee."

In Allen v. Henggeler, 32 Fed. (2d) 69 (C. C. A. 8), this Court says, l. c. 71:

"It has been conclusively determined that the Federal Estate Tax is not levied on the right of inheritance; it is levied and measured by the interest or rights cut off by death (citing the Supreme Court cases cited, supra).

"Decisions under state laws taxing the right of succession or taxing property which pass by will or inheritance are, therefore, not in point." • • •

From the foregoing it is quite clear that what we are concerned with here is whether or not Mr. Guy individually retained any interest in the trust property after the execution of the declarations of trust, which remained in

him to be transferred from him to the living as an incident of his death. The nature of the interests of the beneficiaries and the trustee are not important except in so far as they throw light upon the question of Mr. Guy's individual interest. If Mr. Guy divested himself fully, completely and irrevocably of all interest in the trust property which might inure to his benefit, no interest therein remained to be so transferred and there is no basis for the tax.

Duke v. Commissioner, 23 B. T. A. 1104, l. c. 1112.

Nature of Estates Created.

Where an instrument, by appropriate language, grants a fee to a named person and there is coupled with such grant a further provision that upon the happening of a certain condition or contingency, which may never happen, the estate so devised may be determined, the instrument creates a base, qualified or determinable fee.

Thompson, Construction of Wills, 1st Ed., Sec. 377, p. 508;
Washburn on Real Property, 4th Ed., Vol. 1, p. 88 et seq.

The conditions or contingencies which defeat a qualified or defeasible fee are various, the most common being death without issue of the first taker, or his death intestate without leaving issue or descendants of issue, or his death without leaving a wife or husband or child or children, or his death before distribution, or his death before attaining a certain age, or before another person.

Thompson, Construction of Wills, 1st Ed., Sec. 377, p. 509.

Where such an estate is granted with the provision that upon the happening of a contingency which may or may not happen it shall revert to the grantor, the only interest which the grantor retains is the possibility of having the fee again—a mere possibility of reverter which at common law is not an estate. It is inalienable, unassignable and not devisable, unless made so by statute. Until the contingency happens the whole title is in the grantee.

In Tiedeman on Real Property, 3rd Ed., Sec. 291, p. 431 et seq., the author says:

> "A reversion is that estate which remains to an owner of land after he has conveyed away a particular estate. It is a vested estate of future enjoyment, the possession of which is postponed until the determination of the estate granted. There is always a reversion as long as the entire fee has not been exhausted. Thus, after any number of successive estates for life or for years, there is still a reversion left in the grantor. So, also, is there a reversion after an estate-tail, although there was none after the fee conditional at common law, which the statute 'de donis' converted into an estate-tail. But where one grants a base or determinable fee, since what is left in him is only a right to defeat the estate so granted upon the happening of a contingency, there is no reversion in him. That is, he has no future vested estate in fee, but only what is called a naked possibility of reverter, which is incapable of alienation or devise, although it descends to his heirs. But where the particular estate is an estate upon limitation, and more particularly where it is limited by the life of a person, or by a contingent event, which may cause it to last during some life, the estate will not be such a determinable or qualified fee as does not admit of a reversion, although the estate be granted to A and

his heirs. Thus, a limitation to A and his heirs during the widowhood of B or the residence of C in Rome, would be a life estate, and there would be a reversion left in the grantor instead of a possibility of reverter. A grant to A and his heirs, as long as a tree stands, would likewise leave a reversion in the grantor. But a grant to A and his heirs until B returns from Rome would be a fee upon limitation, and since it is doubtful if the contingency will happen, and if it does not, the estate becomes an absolute fee in the grantee, the grantor has only a possibility of reverter, and not a reversion."

There can be no question that the granting clause in each declaration of trust was sufficient to transfer the entire estate in the property described out of Mr. Guy individually and vest the legal estate therein in himself as trustee and the beneficial interest in the beneficiary. The language is:

"I, William Evans Guy, * * * do hereby declare that I hold in trust for (naming one of his children) the following described property, to wit: (describing the securities), with the powers and for the uses and purposes hereinafter set forth * * *."

See Northrip v. Burge, 255 Mo. 641, 164 S. W. 584; Rollestone v. National Bank of Commerce, 299 Mo. 57, 252 S. W. 394; Korompolis v. Tom Pras, 251 S. W. 80.

The granting clause above quoted, standing alone, would have created merely a passive trust and would have transferred the entire title, legal and equitable, to the beneficiary. This was prevented by the active duties of management imposed on the trustee and the power given the trustee to pay over the income to the beneficiary or

apply the same for his or her benefit or to permit it to accumulate for his or her benefit, in the discretion of the trustee. By the last clause of each instrument it was provided that, in the event the beneficiary should predecease him, the trust property was to revert to Mr. Guy. This provision very obviously did not prevent the granting clause from operating at all, but did have the effect of attaching thereto a condition subsequent upon the happening of which the estate which had already passed to the trustee and beneficiary by virtue of the granting clause should determine and revert to Mr. Guy. In Woods v. Woods, 87 Ga. 562, 13 S. E. 692, the Court held that by a limitation in a deed in trust to a wife in fee which provided that in the event she should predecease grantor the property should revert back to the grantor, the grantor had a mere possibility of reverter. The Missouri courts have passed on the same situation. In Deacon v. St. Louis Union Trust Company, 271 Mo. 669, 197 S. W. 261, the will of the testatrix devised her property to a trustee for the following purposes:

"1st. • • •

"(4) To make division of all my property and the increase thereof at the expiration of thirty years from death amongst my children hereinafter named. Such division may be made in kind, if practicable, or the trustee may sell the whole or any portion thereof, if necessary or convenient in making such distribution. • • •

"(6) The children for whom provision is made herein are the children of my late husband, Jordan W. Lambert, and myself, to wit: Albert, Jordan, Marion, Lily, Gerard and an unborn child of which I am now enceinte. • • •

"(8) In case any child or children shall die before

final distribution, the issue of such child shall have all the rights of the parent, taking per stirpes; but if no issue survive, the share of such deceased child or children shall pass to the survivors of my said children, or their issue, the issue in all cases taking per stirpes.

"3rd. During the minority of my children, and each of them, no greater sum shall be paid over by the trustee to or for any child than shall be reasonably necessary or proper for its support, education and maintenance, according to its estate and condition in life. The excess, if any, of any child's income shall be vested and accumulate till it becomes of age and then be paid over to it."

The Court, with regard to the effect of the provision that each child's share might be defeated by his death prior to distribution, said (l. c. 689):

"It is contended, however, that paragraph 8 of item 1 of the will operates to limit the estate of each child to the condition that they be alive when division is made and that this constitutes a condition precedent and not subsequent. In other words, that the vesting of the trust estate is postponed by this condition and a future estate created contrary to the rule against perpetuities, because of the postponement of the vesting of the estate."

The Court then sets out paragraph 8, supra.

Continuing:

"The inquiry confronting us is the meaning to be placed upon this paragraph. Does it operate to change the prior words of the will from a present interest to one to be vested in the future, and hence in violation of the rule above referred to, or does it simply change or modify the absolute estate vested in

each child by prior provisions of the will into one subject to be divested by a condition subsequent? * * *

"The effect of clause 8, therefore, is to modify the absolute estate vested in each child by the prior provisions of the will, into a present interest, but one subject to be divested by a condition subsequent, namely, death before the end of the trust period, leaving or not leaving issue, as the case may be, thus creating a defeasible instead of an absolute fee. * * *

"* * * The interest of the parents, as we have seen, is that of a defeasible fee. After a fee, nothing remains."

In Pollard v. Union National Bank, 4 Mo. App. 408, Isaac J. Pollard conveyed the real estate in question to Thomas Skinker, trustee for Susan M. Pollard, his wife, by a deed, the habendum clause of which was in the following words:

"To have and to hold the said parcel of ground unto the said Skinker and his heirs forever, upon trust, nevertheless, for the sole and separate use of the said Susan M. Pollard, and subject to the following conditions and stipulations, to wit: If the said Susan M. shall die before the said Isaac J. Pollard, then the property hereby conveyed shall revert to him, the said Isaac J. Pollard; but if he shall die first, then the said property shall remain in the said Susan M., her heirs and assigns forever, subject to her absolute control and disposition."

Susan Pollard died leaving her husband surviving her and he conveyed the property. The question was whether the husband's transferee or the heirs of Susan M. Pollard were entitled to the property. It will be seen that the language of the trust instrument, to wit: "If the said Susan M. shall die before the said Isaac J. Pollard, then the property hereby conveyed shall revert to him, the

said Isaac J. Pollard; but if he shall die first, then the said property shall remain in the said Susan M., her heirs and assigns forever, subject to her absolute control and disposition," is practically identical with the language of the trusts here involved. It was contended by the heirs that the provision for the reverter to the grantor was void as being based upon a fee. The Court, however, held that an equitable fee was created in the wife, subject to be defeated upon the happening of a contingency with a possiblity of reverter in the grantor; that such contingency had happened; and that the husband's transferees were entitled to the property. In arriving at this conclusion, the Court says:

> **"There may be several defeasible fees, and, upon these being defeated, the use may revert to the settler. * * *"**
>
> **"Marked features of the present case are the prominence and plainness given to the terms making the grant to Susan M. Pollard conditional and determinable, and the apt words used to preserve the property though perhaps in another and more advantageous form, in case of the happening of the contingency upon which there was to be a reverter."** (Emphasis ours.)

Patrick v. Blair, 119 Mo. 105, 24 S. W. 767—In this case McManus conveyed certain real estate to Blair, as trustee, with full power to hold and use the same and the income and profits therefrom to the sole and separate use of Camille Patrick, free from the debts and control of any future husband she might have. He further provided that when Camille arrived at the age of 18 years said Blair should convey and set over to her by proper deeds of conveyance to her sole and separate use one-half of the property, together with one-half of all rents and profits

then in the hands of the trustee, and provided also that the said Blair should retain the other one-half to the use of Camille until she arrived at the age of 25 years and should then convey and transfer to her all the estate in his hands.

The instrument further provided that should Camille die leaving no issue before reaching 25 years of age, then the said trustee should convey over to one Patrick (Camille's father), or his heirs, one-sixth of all the estate in the hands of the trustee, and the remaining five-sixths should be conveyed back to McManus. It further provided that should the said Patrick have repaid the trust estate the sum of $4,000, then "at the time of the death of Camille without issue and before reaching the age of 25 years, the trustee should convey one-third of the trust estate to Patrick and two-thirds to McManus."

Camille died at the age of 7, leaving no brothers and sisters. Suit was brought which required the construction of the trust instrument, and the Court said:

> "That the said Camille took a vested estate in the property is not open to serious doubt."

And again (l. c. 114) the Court says:

> "Though the estate of the beneficial grantee was vested, whether in remainder or as a conditional or base fee, it was also determinable upon the happening of certain events therein named. Upon the occurrence of these events the estate, which vested in the beneficiary, became divested and an estate over was substituted.
>
> "Reading the entire instrument in the light of the circumstances under which it was made, there can be no doubt that the testator intended thereby to dispose of the entire estate and that no part thereof should pass by descent to the heirs of Camille, should

she die before reaching the age of 25 years. The language leaves no doubt that in the event of her death before coming into the estate herself, her children should take, if she should leave children, all that remained, not as an inheritance from her, but as a limitation over under the deed. This fact is significant in showing the intent to dispose of the whole estate under the deed, as without the limitation to the children of Camille, the estate being vested in her, they would have inherited the same estate from their mother. The second event named upon the happening of which the estate was limited also made disposition of the whole of it. Should the said Camille marry and die without issue before reaching the age of 25 years, then five-sixths should go to the grantor McManus, and one-sixth to Patrick. The same purpose is here also manifest, as, on the happening of the event named, Patrick, her father, as her only heir at law, would have inherited from her such portion as was not limited to the grantor."

In Coolidge v. Long, 282 U. S. 582, 51 S. Ct. 306, 75 L. Ed. 562, the trust provided that the income of the trust property was to be paid to each of the settlors during their joint lives and then the entire income to the survivor and upon the death of the survivor the principal was to be divided equally among their five sons, provided that if any of the sons should predecease the survivor of the settlors his share should go to those entitled to take his intestate property under the Statute of Distribution in force at the date of the death of such survivor, with the further provision that in no event should the widow of any deceased son take as a distributee more than half of such share. This Court said (l. c. 597):

"By the deed of each grantor one-fifth of the remainder was immediately vested in each of the sons

subject to be divested only by his death before the death of the survivor of the settlors. It was a grant in praesenti to be possessed and enjoyed by the sons upon the death of such survivor (Blanchard v. Blanchard, 1 Allen 223; Clarke v. Fay, 205 Mass. 228; McArthur v. Scott, 113 U. S. 340, 379, and cases cited; and see United States v. Fidelity Trust Co., 222 U. S. 158; Henry v. United States, 251 U. S. 393). The provision for the payment of income to the settlors during their lives did not operate to postpone the vesting in the sons of the right of possession or enjoyment. The settlors divested themselves of all control over the principal; they had no power to revoke or modify the trust (Coolidge v. Loring, supra, 223). Upon the happening of the event specified, without more, the trustees were bound to hand over the property to the beneficiaries. Neither the death of Mrs. Coolidge nor of her husband was a generating source of any right in the remaindermen (Knowlton v. Moore, 178 U. S. 41, 56). Nothing moved from her or him or from the estates of either when she or he died. There was no transmission then. The rights of the remaindermen, including possession and enjoyment upon the termination of the trusts, were derived solely from the deeds. The situation would have been precisely the same if the possibility of divestment had been made to cease upon the death of a third person instead of upon the death of the survivor of the settlors."

In Edson v. Lucas, 40 Fed. (2nd) 398 (C. C. A. 8), the Government sought to collect income taxes from Mrs. Edson upon the profits from the sale of 708 shares of stock which she, Mrs. Edson, had caused to be transferred from her brokerage account to the account of her daughter, Mrs. Pratt. After the transfer had been effected, Mrs. Edson wrote to her daughter as follows:

"To Mrs. Geraldyne Edson Pratt:

"Dear Geraldyne: I have transferred to you two hundred shares of Texas Oil Company stock as a gift, with this reservation, that when you sell the stock you invest the proceeds in United States Government securities, to so remain during your life, with the further understanding that no part of the principal will be disposed of either by sale or used for loan.

"The income use as your best judgment may dictate.

"Should death occur to you before either your father or myself, then the securities will revert to me, otherwise to him.

"If married and no issue, the preceding paragraph will prevail.

"If issue, the securities will be left in trust for the issue.

"Your mother,

"(Signed) Mrs. J. A. Edson.

"Accepted:

"(Signed) Geraldyne Edson Pratt."

This Court held that there was a valid, complete gift of the stock in praesenti and that Mrs. Edson was not taxable for the profits realized on the sale thereof. On page 405 the Court said:

"Nor would it seem to be less a gift because accompanied by words indicating that it was 'provisional,' as in the case of Flint v. Ruthrauff, supra, or so expressed as to make it, though presently vested, subject to defeasance by the death of the donee before the donor, as surely a gift by will or formal deed of trust might be expressed."

On page 406 the Court said:

> "After Mrs. Edson parted with this property, in 1919, she had neither the legal title, nor possession, nor control, nor the income, nor the proceeds, and, if the theory of the Board should be sustained, she had nothing left as an incident of ownership except a mere expectancy and the duty of paying an income tax upon profits which she has never received and in all probability can never receive."

See, also:

> Flint v. Ruthrauff, 26 App. Div. 624, 53 N. Y. S. 206, affirmed 163 N. Y. 588, 57 N. E. 1109;
> Richardson v. Stodder, 100 Mass. 528.

After the granting of a defeasible fee nothing remains in the grantor but a possibility of reverter. Tiedeman on Real Property, 3rd Ed., Sec. 291, p. 431, supra; Deacon v. St. Louis Union Trust Co., supra; Copenhaver v. Pendleton, 155 Va. 463, 155 S. E. 802, 77 A. L. R. 324, l. c. 330, 331.

In this respect the present case differs substantially and materially from Klein v. United States, 283 U. S. 231, and Commissioner v. Schwarz, 74 Fed. (2) 712 (C. C. A. 2). Here a defeasible fee was granted. In those cases only a life estate, a particular estate which was certain to end, was presently granted, and the transfers of the reversion in the Klein case and the contingent remainders in the Schwarz case were made to depend upon the happening of a condition precedent, namely, the death of the grantor prior to the termination of the particular estate.

> "Upon a grant or devise of a particular estate limited to determine upon the happening of an event

which is certain to happen, with a contingent remainder over, there remains in the grantor or devisor a reversion, subject to be defeated by the happening of the contingency upon which the remainder is conditioned." Copenhaver v. Pendleton, 155 Va. 463; 155 S. E. 802; 77 A. L. R. 324, l. c. 342.

In this case each beneficiary was ascertained and the property was presently transferred for his benefit under the express provisions of the instruments. Each took the fee to the trust property immediately, the absolute enjoyment thereof being postponed until the expiration of the trust. Coolidge v. Long, supra; Deacon v. St. Louis Union Trust Company, supra. Nothing could prevent the vesting in enjoyment but the death of the beneficiary prior to the expiration of the trust. No reversion remained in Mr. Guy, only a possibility of reverter. In law as well as in fact he had parted with all beneficial interest in the property.

This distinction is emphasized by the fact that in the Klein and Schwarz cases only the value of the property after deducting the value of the life estate was sought to be included in the gross estate of the decedent, whereas here, as in May v. Heiner, 281 U. S. 238, and McCormick v. Burnet, 283 U. S. 784, the entire value of the trust property is sought to be so included.

It is respectfully submitted that Mr. Guy, by the instruments in question, completely and irrevocably divested himself of all interest in the trust property and that the only interest he had therein at the time of his death was a mere possibility of reverter which was extinguished by his death, and that no interest in the property passed from Mr. Guy to the beneficiaries or any other living person by reason of his death. The effect of the provision

in the trust instruments for a reverter of the property to Mr. Guy in case the beneficiary should predecease him was to attach to an equitable fee a condition subsequent upon the happening of which the fee might have been defeated and determined. The attaching of this condition rendered the fee of the beneficiary a base or conditional fee, but it did not prevent the entire legal estate from passing to the trustee and the entire equitable estate to the beneficiary at the time of the execution of the instrument, and left no alienable, assignable or devisable interest to Mr. Guy. His interest was merely the possibility of a reverter and until the happening of the contingency the whole legal title was in himself, as trustee, and the whole equitable title in the beneficiaries.

Interests of Beneficiaries Vested Although Question Not Important.

Whether the estate which the beneficiary took upon the execution of the trust was vested or contingent is in no way decisive of the question of taxability in view of the nature of the tax here involved.

In McCormick v. Commissioner, supra, which we will discuss more fully later, the Board of Tax Appeals said (l. c. 436):

> "Except for an ingenious argument of the respondent we might well hold with our prior decisions which we deem in accord with Nichols v. Coolidge, supra, and hold that a trust created in 1918 is not to be included in the gross estate of a decedent dying under the Act of 1921. The respondent's argument, however, compels us to consider whether or not the retroactive feature condemned by the Supreme Court is present. The argument is based upon the decision

of the Supreme Court of Illinois in People v. McCormick, 327 Ill. 547, 158 N. E. 861, construing this trust instrument. The holding of the Supreme Court of Illinois, briefly stated, is that the beneficial interest in the property covered by the trust created by Mrs. McCormick on July 27, 1918, did not vest in her children at that time. It is argued, because the property did not vest in the children at the time the trust was created, that the transfer must necessarily have been as of the date of her death and that, therefore, the application of the act cannot be said to be retroactive. There is a fatal flaw in this argument in that the Supreme Court of Illinois did not decide that Mrs. McCormick did not divest herself of all interest in the property, but merely decided that the property did not vest in her children until after her death. The latter holding is of no assistance in determining the question which we have before us. The Supreme Court of Illinois was considering the question from the standpoint of the Illinois inheritance tax, which differs from the federal tax in that it is a tax upon the right to receive, whereas the federal estate tax is upon the right to transmit."

In Safe Deposit & Trust Company of Baltimore v. Tait, 7 Fed. Supp. 40 (District Court, District of Maryland), the Court says (l. c. 47):

"A study of the cases above cited leads to the conclusion that, where the donor parts with all personal interest in the property, except a life estate, and the transfer is not in fact made in contemplation of death, it is not rendered taxable under subsection (c) by reason of the nature or quality of the estate taken by the named beneficiaries, whether vested or contingent, subject to be divested, or contingent in law or in fact."

Nevertheless, it may be noted that neither the postponement of the actual possession nor the provision for the accumulation of income nor the fact that the interest of a beneficiary might be defeated by his death prior to that of the grantor prevented the interests of the respective beneficiaries from vesting upon the execution of the instrument.

Patrick v. Blair, supra;
Pollard v. Union National Bank, supra;
Shukert v. Allen, 273 U. S. 545, 47 S. Ct. 461, 71 L. Ed. 764;
Deacon v. St. Louis Union Trust Company, supra;
Coolidge v. Long, supra.

In Shukert v. Allen, supra, the instrument in question conveyed the property to a trustee in trust to accumulate the income until February 1, 1951, unless the last of the beneficiaries should have died more than twenty-one years before that date and then to deliver the principal and undistributable income among his three children there named. The Supreme Court said:

> "Although the Circuit Court of Appeals seems to have thought otherwise, the interest of the children respectively was vested as soon as the instrument was executed, even though it might have been divested as to any one of them in favor of his issue, if any, or of the surviving beneficiaries, if he died before the termination of the trust. • • •
>
> "It is not necessary to consider whether the petitioner goes too far in contending that section 402 (c) should be construed to refer only to transfers of property the possession or enjoyment of which does not pass from the grantor until his death. But it seems to us tolerably plain that when the grantor parts with all his interest in the property to other

persons in trust, with no thought of avoiding taxes, the fact that the income vested in the beneficiaries was to be accumulated for them instead of being handed to them to spend, does not make the trust one intended to take effect in possession or enjoyment at or after the grantor's death."

Obliteration of Possibility of Reverter.

We have endeavored in the above discussion to demonstrate that upon principle the petitioner's position is erroneous. The discussion is probably superfluous in view of the fact that the specific argument that a provision in a trust instrument under which the trust property may revert to the grantor upon the happening of a contingency over which he has no control makes the trust property subject to estate tax has on several occasions been considered and rejected by this court.

In May v. Heiner, 281 U. E. 238, 50 S. Ct. 286, 74 L. Ed. 826, Pauline May, wife of Barney May, by written instrument "transferred, set over and assigned" to him and others, as trustees, with power to change the investments, certain described securities—bonds, notes, corporate stocks and money—in trust, to collect the income therefrom and, after discharging taxes, expenses, etc., to pay the balance "to Barney May during his lifetime and after his decease to Pauline May during her lifetime and, after her decease, all the property in said trust in whatever form or shape it may be shall, after the expenses of the trust have been deducted and paid, be distributed equally among" her four children, their distributees or appointees. The Government argued that the fact that the grantor might receive the income from the trust property during her life, in the event she survived her husband, made the trust taxable as one intended to take effect at death. The

Government's brief, as reported in the official reports (l. c. 241), says:

> "In any event, we contend that the termination by death of a contingent life estate will support the tax, which is one imposed upon 'an interest which closed by reason of death' (Y. M. C. A. v. Davis, 264 U. S. 47; Edwards v. Slocum, 264 U. S. 1). The right of the decedent to receive the income of this trust for life in the event she survives her husband is a right which may postpone the enjoyment by the remaindermen of the economic benefits of the property transferred. The termination of this right by the death of the decedent, freeing the remainder of the possibility of its exercise, is a transfer within the meaning of the statute, properly measured by the value of the property thus relieved of the burden."

This argument was disposed of summarily by the Court in a unanimous opinion in the following manner (l. c. 243):

> "The transfer of October 1st, 1917, was not made in contemplation of death within the legal significance of those words. It was not testamentary in character and was beyond recall by the decedent. **At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possess[illegible] immediately prior to her death was obliterated [illegible]hat event."** (Emphasis ours.)

It has been suggested that this case is not in point because Mrs. May had no possible interest in the corpus. However, the Government argued that the retention of income was equivalent to the ownership of the property. The Court did not pass squarely on this issue ruling instead that Mrs. May did not, at her death, have any inter-

est in the income by reason of the fact that under the instrument the right to receive the income might have reverted to her.

On March 2, 1931, Burnet v. Northern Trust Company, 283 U. S. 782, 51 S. Ct. 342, 75 L. Ed. 1412; Morsman v. Burnet, 283 U. S. 783, 51 S. Ct. 343, 75 L. Ed. 1412, and McCormick et al., Executors, v. Burnet, 283 U. S. 784, 51 S. Ct. 343, 75 L. Ed. 1413, were decided by this Court.

By these decisions it was determined that neither the retention by a grantor of the income from the trust property nor a power of disposition over the income from the trust property and power to reclaim all or a part of the income, nor the possibility that the corpus of the trust would revert to the grantor in the event he survived certain beneficiaries, would render the transfers taxable. All three cases were decided upon the authority of May v. Heiner, supra, and were unanimous decisions.

In Burnet v. Northern Trust Company, supra, the grantor created an irrevocable trust by which he retained a life interest in the income.

In Morsman v. Burnet, supra, the grantor by an irrevocable trust directed that the income from the trust property be paid to him during his life and accumulated for a period of two years after his death, to be distributed to certain named beneficiaries or their survivors two years after the grantor's death.

The McCormick case we shall treat more fully because it is identical in principle with the present case.

This case was instituted in the Board of Tax Appeals, reported in 13 B. T. A. 423, and involved certain transfers made by Mrs. Nettie Fowler McCormick of property in excess of $7,000,000.00. The pertinent provisions of the

trust instrument were as follows: The property was transferred to the United States Trust Company of New York and consisted of some 3,700 shares of the capital stock of the McCormick Harvesting Machine Company. It was provided that during the grantor's life the trustee should accumulate and add to the principal of the trust estate all income except so much as should be required for the following purposes: (1) In case the grantor's income from property of her own not transferred should in any year be less than $250,000.00, the trustee, upon request, should turn over to her such amount of the net income as, when added to her other income, would make her total income $250,000.00 a year; (2) that during the grantor's life the trustee should pay over such sums from the net income of the property to such charitable uses and purposes as the grantor might designate. It was provided that upon the death of the grantor the income of the property should be distributed one-third to each of the grantor's three children so long as they severally lived, and that from and after the death of either of said three children his or her share should be paid over in accordance with any direction in regard thereto contained in his or her last will, and in default of any such directions, then to his or her surviving issue, and in default of such issue, then to the other beneficiaries entitled to participate in the income. It was further provided that the trust should terminate in any event upon the death of the last survivor of the three children of the grantor thereinbefore named, and that it might be terminated during the grantor's lifetime by an instrument in writing signed by the grantor and one or more of her three children. It was further provided:

> "Upon the termination of said trust as aforesaid, either in whole or in part, the trust estate as to which said trust shall be so terminated shall be paid over

and delivered to said party of the first part (grantor) if she shall then be living, and, in the event that she shall not then be living, shall be paid over and distributed as follows:

"(a) One-third thereof to each of the three children of said party of the first part," etc.

The Government contended that the amount of the trust property was properly included in decedent's gross estate for the reason that Mrs. McCormick did not part with the possession and enjoyment of the property included in the trust. The arguments that she did not were based upon the following provisions of the trust instrument: (1) The provision by which she reserved the right to direct the investment; (2) the provision by which she reserved the right to request the issuance of proxies on the stock; (3) the provision for the accumulation of income and the reservation of the right to direct the payment of income to designated charities; (4) the provision by which she reserved the right to be paid a portion of the income of the trust estate in case her income should fall below $250,000.00 in any year; (5) the provision that should the decedent survive the beneficiaries the trust would terminate and she would take the trust property. The Board determined that none of these provisions rendered the trust taxable, *and said:*

"We come to this conclusion by looking at the purpose of Congress, as we conceive it, to include as a measure of the tax estate, in addition to those assets which are held at death, only such assets disposed of prior to death as bore a reasonable relation to the privilege taxed. We are confirmed in this conclusion when we consider that Mrs. McCormick completely divested herself of legal title and beneficial ownership five years prior to her death, subject only to certain

restrictions and contingencies which, in fact, never operated."

Two members of the Board dissented upon the fourth point, which was the right to be paid a portion of the income of the trust in case her own income should fall below $250,000.00 in any one year. The Commissioner appealed to the Circuit Court of Appeals for the Seventh Circuit, which reversed the Board of Tax Appeals in an opinion reported in Commissioner v. McCormick, 43 Fed. (2) 277. As appears from the official report, the argument advanced by the Government was as follows:

(1) The conveyance in trust was revocable;

(2) Mrs. McCormick's retention of the life use of the income from the estate transferred negatived any alleged intention to transfer the use and enjoyment of the economic benefit before her death;

(3) **The transfer of the corpus of the trust was not complete until Mrs. McCormick's death, because of the provision of the trust agreement which necessitated the transfer of the trust property to the decedent in case she survive her three children.** (Emphasis ours.)

The opinion of the Circuit Court of Appeals did not hold that any particular one of the provisions set out above made the transfer taxable, as a matter of law, but seemed to be of the opinion that taken together it was possible to determine, as a matter of fact, that Mrs. McCormick intended the transfer to take effect at her death. One of the grounds for reaching this determination was the presence of the possibility of reversion of the property to the grantor. On page 279 the Court says:

"But another clause of the trust agreement supp[illegible]-

ments this conditionally revocable clause and merits separate consideration. The last paragraph which we have quoted from the trust agreement calls for the payment of the trust estate to settlor in case she survived the beneficiaries. The inferences deducible from such a clause would ordinarily be legal ones, rather than fact conclusions. But the question before us, in view of the statute which makes intention the determinative issue, necessitates a consideration of all the provisions of the trust agreement."

However, the decision of the Circuit Court of Appeals was reversed, and that of the Board of Tax Appeals affirmed in McCormick v. Burnet, 283 U. S. 784.

There can be no distinction in principle between the McCormick case and the present case. In both cases the trust was limited to continue during the grantor's lifetime and to terminate upon the death of the beneficiary or beneficiaries prior to that of the grantor. In the McCormick case the trust property was to revert to the grantor in case she survived her three children. In the present case the trust property held in each trust, in case the grantor survived the child who was the beneficiary of that particular trust, was to revert to the grantor. The fact that in one case it was necessary for the grantor to survive three people and in the other it was only necessary that he survive one goes only to the remoteness of the possibility of reverter. We submit that the degree of remoteness can have no effect upon the principle involved. If the possibility that the fund might revert to the grantor is sufficient in law to make the transfer taxable, it is immaterial whether the possibility rests upon the grantor's surviving one or thirty people. If, however, the remoteness of the possibility is of any consequence, it may be noted that Mr. Guy was fifty years older than his oldest child

and that before he could have actually regained the property which has been included in his estate by the Commissioner he would have had to survive all four of his children.

The McCormick case was decided by the per curiam decision of this Court and is identical in principle with the facts here involved and was conclusive and controlling upon the Circuit Court of Appeals.

After the decision in the McCormick case the Board of Tax Appeals decided the case of Nanaline H. Duke et al., Executors, v. Commissioner, reported in 23 B. T. A., at page 1104. This case involved two transfers by James B. Duke during his lifetime, one dated May 2, 1917, and the other September 4, 1917, by which he conveyed property which had a value in excess of $30,000,000.00 at the date of his death, to himself, as trustee for the benefit of his daughter, Doris Duke, and her descendants. By the first instrument the said James B. Duke transferred to himself, as trustee, and to the Farmers Loan & Trust Company as successor trustee, the property in question, upon the following trusts: The said Duke to continue as sole trustee so long as he should live and with power to collect the income from the trust property and apply it for the personal support, maintenance and education of said Doris Duke and any child or children, descendant or descendants of the same that she may have during the period covered by said trust, at such time or times, in such manner, to such extent and in such amounts as said trustee may, in his sole discretion, deem to be to the best interest of the trust created by said indenture. Section B of said indenture contained the following clause: "Should the said Doris Duke die in the lifetime of the said J. B. Duke, this trust shall immediately cease and determine, and thereupon all properties of every nature then held in trust un-

der and by virtue of this indenture shall go, revert and belong to the said J. B. Duke absolutely, and said trustee or his successor, as such trustee, shall forthwith pay, convey, assign, transfer and deliver the same to the said J. B. Duke."

The second trust instrument made J. B. Duke trustee and Nanaline H. Duke first successor trustee, and the Farmers Loan & Trust Company second successor trustee, and contained substantially the same provisions as to the trustees' duties during the lifetime of himself and his daughter Doris Duke, except that Mr. Duke, as trustee, was given power to pay over to Doris Duke or any child born to her during the trust period the whole or any part or parts of the principal and/or income of the trust estate at such time or times, in such manner, for such purpose and in such amount, kind and value, as he deemed to be for the best interest of the trust created, with provision for the termination of the trust when the entire trust property had been paid over. Section B of this instrument further provided:

> "Should the said Doris Duke die in the lifetime of said J. B. Duke, this trust shall immediately cease and determine and thereupon all properties of every nature then held in trust under and by virtue of this indenture shall go, revert and belong to the said J. B. Duke absolutely, and said trustee or his successor as such trustee shall forthwith pay, convey, assign, transfer and deliver the same to the said J. B. Duke."

The pertinent parts of the opinion of the Board are as follows (l. c. 1112):

> "As stipulated by the parties, we have found that neither of the trust instruments constituted a transfer or created a trust in contemplation of the grantor's

death. The respondent included the value of the trust properties in the decedent's gross estate on the sole ground that the trusts were 'intended to take effect in possession or enjoyment at or after his death.'

"Whether the respondent's action on this point is correct constitutes the question presented for decision here, and its solution must depend upon the nature and extent of the transfers effected by the trust instruments. The tax in controversy is an excise tax laid upon the transfer of property by death, and is measured by the value of the property so transferred. Therefore, if the decedent in this case by the said trust instruments divested himself fully, completely and irrevocably of all interest in the trust property which might inure to his benefit, no interest therein remained to be transferred as an incident of his death, and there is no basis for the tax (Cf. Saltonstall v. Saltonstall, 276 U. S. 260).

"In Reinecke v. Northern Trust Co., 278 U. S. 339, where the applicable statute was Section 402 (c) of the Revenue Act of 1921, which, so far as material here, is substantially the same as Section 302 (c) of the 1924 Act, supra, the Court said:

" 'In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred. • • • One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax. • • •

" 'It is of significance, although not conclusive, that the only section imposing the tax, section 401, does so on the net estate of decedents and that the miscellaneous items of property required by section 402 to be brought into the gross estate for the purpose of computing the tax • • • are either property transferred in contemplation of death or property passing out of the control, possession or enjoyment of the decedent at his death. The two sections read together indicate

no purpose to tax completed gifts made by the donor in his lifetime not in contemplation of death, where he has retained no such control, possession or enjoyment. In the light of the general purpose of the statute * * * we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in section 402 (c) "to take effect in possession or enjoyment at or after his death," include any others than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under section 401. That doubt must be resolved in favor of the taxpayer.'

"The facts of this case bring it squarely within the principles above stated by the Supreme Court. The decedent made an absolute and unconditional gift of the property embraced in the two trusts. It is true the instruments provided that the property should revert to the decedent if the beneficiary predeceased him, but this was a mere possibility which did not, in fact, occur. Such possibility of reversion did not prevent the gift from being complete. In the case of Commissioner v. McCormick, 43 Fed. (2d) 277, the Circuit Court of Appeals for the Seventh Circuit held that the fact that the settlor could revoke the trust if the beneficiary predeceased her was a factor to be considered in determining whether the trust was revocable or whether the gift was to take effect in enjoyment or possession at or after death, but the Supreme Court reversed that decision (McCormick v. Commissioner, 283 U. S. 784) on authority of May v. Heiner. In the case at bar the trust was not revocable. We passed on a similar question in the case of Lillian M. Wheeler, Executrix, et al., 20 B. T. A. 695, and the Supreme Court, in the case of May v. Heiner, 281 U. S. 238, decided the question adversely to the Commissioner.

"In this case the trust was actually created and took effect and the property passed to it before de-

cedent's death. Nothing passed at or after his death. The fact that there was a bare possibility that the property which had already passed to the trust for the beneficiary might revert to the grantor during his lifetime, not by any act on his part, does not have the effect of reserving to the grantor any rights or benefits which passed at or after his death. He might have, by a bare possibility, reacquired the property during his life, but he did not. In the case of a gift by a man to his child or wife there is always a possibility that the donee may die, leaving the grantor sole heir and thus a possibility of the donor reacquiring the property, but clearly this mere possibility is not sufficient to create or reserve in the donor property rights which pass to the donee only at or after the donor's death, where the donee has had both the possession and enjoyment thereof during the donor's lifetime. This might equally be true whether the trust instrument contained any such provision or not. This contingency or possibility did not give the donor any rights of control over the property. He could not have recalled the property to himself. When he died he was not seized or possessed of the property.

"Decedent did not retain control over the economic benefits or enjoyment of the property. He retained no control which might inure to his own benefit. He did not reserve the power to change, modify or revoke the trusts. He could not designate a new and different beneficiary. The fact that he appointed himself trustee with powers to administer the trust properties for the benefit of his daughter does not change the result. (See Lillian M. Wheeler, Executrix, et al., supra.) In Reinecke v. Northern Trust Co., supra, the Court made this point clear in the following language:

" 'Nor did the reserved powers of management of the trust save to decedent any control over the economic benefits or the enjoyment of the property. He would equally have reserved all these powers and

others had he made himself the trustee, but the transfer would not, for that reason, have been incomplete. The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made. His power to recall the property and of control over it for his own benefit then ceased, and as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift inter vivos not subject to the tax.' (Emphasis supplied.)

"We see no basis for the contention of the respondent that the transfer of the property was contingent. The property was clearly transferred from the decedent by the trust instruments. As above set out, the fact that he was trustee is of no importance. Any uncertainty or contingency as to who might eventually receive the trust corpus as the result of the named beneficiary dying or the fact that under a certain contingency the legal heirs of decedent might receive the property does not indicate that the decedent had not parted with the property and all economic benefits thereof in his lifetime. We cannot overlook the plain fact that the decedent did not own the property or any economic benefits therein when he died or the fact that no economic interests or benefits therein passed at his death. The entire disposition of the property, in so far as the decedent was concerned, was completed during his lifetime. The death of the decedent was not the generating source of any right in any beneficiary. Nothing moved from him on his death, in so far as the property here involved is concerned. It is unimportant that under certain circumstances other or different beneficiaries might eventually, pursuant to the trust instrument, receive the corpus.

"The decedent, however, did not reserve any right to change beneficiaries or to direct any disposition of the property until his death.

"We think the respondent erred in including in the decedent's gross estate the value of the properties embraced in the two trust instruments in question. His action on this point is, therefore, reversed. (See Shukert v. Allen, 273 U. S. 545; May v. Heiner, 281 U. S. 238; Coolidge v. Long, 282 U. S. 582; McCormick v. Commissioner, supra; Lillian M. Wheeler, Executrix, 20 B. T. A. 695.)

"In accordance with the stipulation of the parties, judgment will be entered that there is a deficiency in the amount of $500,000.00." (Emphasis ours.)

The decision of the Board of Tax Appeals was affirmed by the Circuit Court of Appeals in Commissioner of Internal Revenue v. Duke, 62 Fed. (2) 1057 (C. C. A. 3), in which the Court says:

"In this tax case the Commissioner appeals from a decision of the Board of Tax Appeals. The decisive question is whether two trust agreements created by James B. Duke, the decedent, seven years before his death, were intended to take effect in possession or enjoyment at or after his death. The facts are discussed in the opinion of the Tax Board reported at 23 B. T. A. 1104, and we avoid needless repetition by reference thereto. The trust instruments were executed, delivered and went into effect in 1917. They were irrevocable."

"The situation here is akin to the principle laid down by the Tax Board in Wheeler v. Commissioner of Internal Revenue, 20 B. T. A. 695:

" 'The trustor retained no control, possession or and could be only those of a trustee.'

"Moreover, all of the discretions vested in either or both of the trustees were to be exercised for the benefit, not of themselves or for the creation of the trusts, but wholly for the benefit of the beneficiaries under the trust. While the amount here involved is

large, the decisive principle is simple. The facts and authorities have been so fully discussed by the Tax Board that we confine ourselves to affirming their decree."

Certiorari was granted to the Commissioner from the decision of the Circuit Court of Appeals, and in this court, in the case of Helvering, Commissioner, v. Duke, 290 U. S. 591, 54 S. Ct. 95, 78 L. Ed. 87, the following order was entered:

"October 23, 1933. Per Curiam: Decree affirmed by an equally divided court. Mr. Chief Justice Hughes took no part in the consideration or decision of the case."

In Elizabeth B. Wallace, Executrix, v. Commissioner, 27 B. T. A. 902, the decedent transferred to the Guaranty Trust Company of New York certain property to collect the income therefrom and pay the same over to the decedent for and during the term of her natural life. The trust instrument contained the following clauses:

"Third: Upon the death of said 'Grantor' the 'Trustees' are hereby directed to and they shall pay over, assign, transfer and deliver the entire trust estate remaining undisposed of in their hands to 'Grantor's' daughter, Elizabeth V. Bulen, if she be living, absolutely and forever.

"Fourth: It is hereby mutually fully understood and agreed that if Elizabeth V. Bulen dies before the 'Grantor,' during the continuance of this trust, that the trust herein created then ceases and is of no further force and effect, and in such case the 'Trustees' are then hereby authorized and directed to turn over to the 'Grantor,' freed from this trust, all of the principal and income of said trust, after deducting

all commissions, as hereafter provided for legal or other expenses or proper indebtedness incurred by said 'Trustees.' "

The Board of Tax Appeals held the trust was not taxable, saying:

"In the McCormick case, as in the instant proceeding, there was a possibility of the trust property reverting to the grantor in the event that the beneficiary predeceased her. That event did not happen and apparently made no difference in the Supreme Court's decision, although some point is made of this possibility of reversion before the Circuit Court of Appeals, which reversed the Board (43 Fed. [2] ..), which in turn was reversed by the Supreme Court. • • • Elizabeth V. Bulen's interest in the trust property vested upon the execution of the trust instrument in 1920 and the death of the grantor was not the generating source of definite accession to the survivor's property rights, but merely the obliteration of the decedent's life estate, upon which event the daughter came into possession of the property, to which her rights had been fixed and vested upon the execution of the trust instrument in 1920. There was no transfer from the dead to the living upon which to levy the estate tax. The value of the trust property was incorrectly included in the decedent's gross estate."

The Board's decision was affirmed by the Circuit Court of Appeals for the Second Circuit in Commissioner v. Wallace, 71 Fed. (2nd) 1002 (C. C. A. 2), upon authority of McCormick v. Burnet, supra, and May v. Heiner, supra. This Court, on October 15, 1934, denied the Commissioner's application for certiorari (293 U. S. 600). Upon the authority of these cases, Commissioner v. Bonney, 75 Fed. (2nd) 1008 (C. C. A. 2), and Commissioner v. Dunham,

73 Fed. (2nd) 752 (C. C. A. 7), have been decided in favor of the respective taxpayers and no appeal taken by the Commissioner.

In all the foregoing cases there was provision for the reversion of the trust property to the grantor in the event the beneficiary or beneficiaries predeceased the grantor. In McCormick v. Burnet, supra, the grantor had complete control over the disposition of the income and the undistributed balance was to accumulate. In many of the cases the entire income was to be paid over to the grantor for life, so that no beneficiary had any interest in the income. In Helvering v. Duke, supra, the amount of income to be paid over to the beneficiary rested in the sole discretion of the grantor as trustee and the undistributed balance was to accumulate. In none of the cases could absolute title in the trust property vest in the beneficiary until the death of the grantor. In all these cases defeasible interests of beneficiaries were rendered indefeasible by the death of the grantor. In all these cases the Government argued unsuccessfully that the transfer from the decedent was contingent upon his death and that no transfer from the decedent took place until at and as a result of his death. Under these circumstances, we submit, the question is no longer an open one.

In reliance upon the decision in McCormick v. Burnet, supra, respondents have not paid estate tax to the State of Missouri within the time allowed for taking credit upon federal estate tax under Section 301 (b), Revenue Act of 1926. To change the law at this time would work an unjustified hardship on respondents and would tend to discriminate between taxpayers.

Cases Relied On by Petitioner.

In the court below the petitioner cited Saltonstall v. Saltonstall, 276 U. S. 260, 48 S. Ct. 225, 72 L. Ed. 565; Chase National Bank v. United States, 278 U. S. 327, 49 S. Ct. 126, 73 L. Ed. 405; Reinecke v. Northern Trust Company, supra; Klein v. United States, 283 U. S. 231, 51 S. Ct. 398, 75 L. Ed. 996; Tyler v. United States, 281 U. S. 497, 50 S. Ct. 356, 74 L. Ed. 991; Porter v. Commissioner, 288 U. S. 436, 53 S. Ct. 451, 77 L. Ed. 880; Sargent v. White, 50 Fed. (2nd) 410; Hoblitzelle v. United States, 3 Fed. Supp. 331, and Union Trust Co. v. United States, 54 Fed. (2nd) 152, certiorari denied 286 U. S. 547.

Saltonstall v. Saltonstall, supra, involved the constitutionality of a state inheritance tax, and, in addition, the trust there involved was revocable.

In Reinecke v. Northern Trust Company, supra, those trusts which were held taxable were revocable.

In Porter v. Commissioner the decedent retained the power to make any change in the disposition of the trust property except to reclaim it himself, and the Court held that the property was taxable under section 302 (d) of the act.

In Chase National Bank v. United States, supra, the Court held constitutional the specific section of the act imposing a tax upon the proceeds of policies of insurance where the decedent retained all the legal incidents of ownership over the policies during his lifetime.

In Tyler v. United States, supra, the Court held constitutional the specific section of the act which required the inclusion in a decedent's gross estate of property in which he had, during his lifetime, an interest as tenant by the

entirety, except where shown that the other tenant had contributed a portion of the consideration therefor. The opinion virtually concedes that the tax imposed by this particular provision is a succession rather than a transfer tax, but holds that it was a proper death duty which Congress had the power to impose if it chose to do so. (See Coolidge v. Long, supra, l. c. 609.) The language of the last two cases has to do with the subjects upon which Congress may, within its constitutional powers, levy death duties. It has no bearing upon what constitutes a transfer within the meaning of section 302 (c) of the act. The fact that Congress deemed it necessary to enact these special sections indicates that it did not consider that the subject matter thereof, namely, the enlargement or ripening of an interest of a living person by reason of the death of another, was included under the category of transfers intended to take effect at death.

In the Klein Case a husband made a deed of property directly to his wife, as follows:

> "First. To have and to hold the said lands unto the said grantee for and during the term of her natural life, and if she shall die prior to the decease of said grantor then and in that event she shall by virtue hereof take no greater or other estate in said lands and the reversion in fee and to the same shall in that event remain vested in said grantor, his heirs and assigns, such reversion being hereby reserved to said grantor and excepted from this conveyance.
>
> "Second. Upon condition and in the event that said grantee shall survive the said grantor, then and in that case only the said grantee shall by virtue of this conveyance take, have and hold the said lands in fee simple, unto the sole use of herself, her heirs, and assigns forever."

The Court held the property taxable, saying (l. c. ...):

> "The two clauses of the deed are quite distinct—the first conveys a life estate; the second deals with the remainder. The life estate is granted with an express reservation of the fee, which is to 'remain vested in said grantor' in the event that the grantee 'shall die prior to the decease of said grantor.' By the second clause the grantee takes the fee in the event—'and in that case only'—that she shall survive the grantor. It follows that only a life estate immediately was vested. The remainder was retained by the grantor; and whether that ever would become vested in the grantee depended upon the condition precedent that the death of the grantor happen before that of the grantee. The grant of the remainder, therefore, was contingent."

In this case by the first clause only a life estate was carved out of the fee. The balance of the fee was expressly reserved to the grantor and by the express provisions of the instrument was not to pass out of the grantor until the happening of a condition precedent, namely, his death prior to that of his wife. In the present case, as in the McCormick Case, the Wallace Case and the other cases cited herein, the fee passed by the grant, only to be revested in the grantor upon the happening of a condition subsequent. The McCormick Case and the Klein Case were argued the same day (February 27, 1931), and in the one the property was held taxable and the other not taxable.

In Sargent v. White, supra (C. C. A. 1), the decedent made a transfer in trust:

> "To pay over in their discretion as they may deem advisable the whole or any part of the net income of the trust estate to me, the said Frank W. Remick,

or in their discretion, in case they deem it advisable, to accumulate any part or the whole of the net income, and such part of the net income as is not paid to me shall in each year be added to and made part of the principal of the trust fund. If I survive my wife, Mary H. Remick, then upon the decease of my said wife, Mary H. Remick, said trust shall cease and the Trustees shall pay over, transfer, deliver and convey the Trust Estate absolutely free and discharged of every trust to me, said Frank W. Remick. If, however, my said wife, Mary H. Remick, survives me, then the Trustees shall upon my death pay over, transfer, deliver and convey the trust estate absolutely free and discharged of every trust to my said wife, Mary H. Remick."

The trial court, in Sargent v. White, 46 Fed. (2nd) 79, held the property taxable because of the interest in the income retained by the grantor upon the authority of Morsman v. Commission, 44 Fed. (2d) 902 (C. C. A. 8), which had not then been reversed by the Supreme Court. On appeal, the Circuit Court of Appeals sustained the District Court upon the ground that the decedent had in effect "conveyed the trust funds to the trustees to hold during his life, with a contingent remainder in himself and in his wife." The distinction between this case and the instant case is obvious from the fact that in the instant case the decedent's children are named as the beneficiaries of the trust, whereas in the Sargent case the decedent named himself and his wife as the joint beneficiaries. The effect of the conveyance in the Sargent case was to create an equitable estate by the entirety, and, had the property been real estate, the decedent would have accomplished the exact equivalent if he had transferred the property to a trustee to hold for the benefit of Frank W. Remick and

Mary H. Remick, his wife, as tenants by the entirety and not as tenants in common. Immediately before the transfer in the Sargent case Remick owned the property outright and immediately after the transfer he had a present joint beneficial interest in the property which was at least equal to, if not greater, than that of his wife. In the present case immediately after the transfer each beneficiary had a determinable equitable fee, and Mr. Guy had only a possibility of reverter (see Bonney v. Commissioner, supra).

In Hoblitzelle v. United States, supra, the decision of the Court of Claims does contain a dictum to the effect that because the trust property might revert to the grantor in the event of the death of either of her daughters, during her lifetime, the interest would be taxable. However, the statement is completely unnecessary to the decision of the case, which is based upon the fact that the decedent retained the power to alter and amend the trust which made it taxable under subsection (d) of the act upon the authority of Porter v. Commissioner, supra. Under these circumstances the dictum does not represent the opinion of the Court, but only of the Judge who wrote it. (See Safe Deposit & Trust Company v. Tait, 7 Fed. Supp. 40, l. c. 47.)

In Union Trust Co. v. United States, supra, the beneficiary had the mere possession of the property until the grantor's death.

Significance of Amendments of the Law.

Immediately after the decisions of the Supreme Court in the cases of Burnet v. Northern Trust Company, supra; Morsman v. Burnet, supra, and McCormick v. Burnet, supra, were handed down, Congress, by joint resolution,

on March 3, 1931, which was approved by the President at 10:30 p. m. that day, amended Section 302 (c) of the Revenue Act of 1926 by adding thereto the language hereafter set out in bold-face type, so that the same read as follows:

> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, **including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of or the income from the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom** * * *."

In proposing this resolution in the House, Mr. Hawley, chairman of the ways and means committee, said:

> "Yesterday afternoon the Supreme Court of the United States handed down decisions in three cases—Burnet against Northern Trust Co., Morsman against Burnet, and McCormick against Burnet—in which the Court held that where an owner of property had made a transfer in trust reserving the income of the property, or the right to dispose of the income therefrom, to himself for life, with remainder to others after his death, the value of the property should not be included in the estate of the donor for purposes of federal estate tax upon his death.
>
> "It had generally been considered that this provision of the statute covered cases such as those referred to above. The Treasury Department had so construed the statute since the first federal estate tax law in 1916 and its regulations so provide. If, for example, the owner of property transferred the title to his house to a trustee for the benefit of his children

after his death, but in the meantime reserved the use, income and enjoyment of the house to himself during his own lifetime, it was supposed that the value of the property at the date of his death should be included in his estate for purposes of estate tax. Under the decisions rendered yesterday the property would not be included in computing the federal estate tax.

"It is entirely apparent that if this situation is permitted to continue, the federal estate tax will be seriously affected. Entirely apart from the refunds that may be expected to result, it is to be anticipated that many persons will proceed to execute trusts or other varieties of transfers under which they will be enabled to escape the estate tax upon their property. It is of the greatest importance therefore that this situation be corrected and that this obvious opportunity for tax avoidance be removed. It is for that purpose that the joint resolution is proposed."

Similar statements were made in the Senate by Senator Smoot, chairman of the finance committee, in presenting this joint resolution.

From the language of the amendment and the purpose of the resolution as stated by the chairman of the ways and means committee, it is obvious that purpose of the change was to make explicit Congress' intention to make transfers taxable where the grantor retained the income for life, as was done in the Morsman and Northern Trust Company cases, or the right to designate the persons who should receive the income or the property, as was done in the McCormick case. No exception whatever was taken to the decision in the McCormick case upon the question that the possibility that the trust property might revert to the grantor did not make the property taxable. This would seem to be conclusive evidence that Congress agreed with the Supreme Court's holding in the McCor-

mick case and agreed with the Supreme Court's construction of the Revenue Act of 1926, then in force, to the effect that a mere possibility of reverter of the property reserved in the transferor did not make the transfer one intended to take effect in possession or enjoyment at or after death. The reason for this is obvious when the actualities of the situation are considered. In a general sense all taxation, direct and indirect, has its foundation in the protection which the sovereign furnishes the taxpayer in the exercise of the privilege of owning and using property. Where a man has the unfettered enjoyment of the income of property he is to all intents and purposes the owner of the property and it is only fair that the property should be so treated for purposes of taxation. Where, however, he has parted with all title to the property, both principal and income, and all beneficial interest therein, retaining only a chance that upon the happening of a contingency which he can neither accelerate nor retard he may reacquire the property, he is no longer the owner of the property in any practical sense of the word. To treat the property as his for purposes of taxation would be to levy a tax which has no reasonable relation to the privilege taxed.

Section 302 of the Act of 1926 was further amended by Section 803 (a) of the Act of 1932, the amendment consisting of the matter in bold-face type, so that the section now reads:

> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has

retained for his life or **for any period not ascertainable without reference to his death or for any period which does not in fact end before his death** (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *"

The purpose of the latter amendment is set out in the Report of the Senate Finance Committee on Revenue Bill of 1932, as follows:

"The purpose of this amendment to Section 302 (c) of the Revenue Act of 1926 is to clarify in certain respects the amendments made to that section by the joint resolution of March 3, 1931, which were adopted to render taxable a transfer under which the decedent reserved the income for his life. The joint resolution was designed to avoid the effect of decisions of the Supreme Court holding such a transfer not taxable if irrevocable and not made in contemplation of death. Certain new matter has also been added, which is without retroactive effect.

"The changes are:

"(1) The insertion of the words 'or for any period not ascertainable without reference to his death,' is to reach, for example, a transfer where decedent reserved to himself semiannual payments of the income of the trust which he had established, but with the provision that no part of the trust income between the last semiannual payment to him and his death should be paid to him or his estate, or where he reserves the income, not necessarily for the remainder of his life, but for a period in the ascertainment of which the date of his death was a necessary element.

"(2) The insertion of the words 'or for any period which does not in fact end before his death,' which is to reach, for example, a transfer where decedent, 70 years old, reserves the income for an extended term of years and dies during the term, or where he is to have the income from and after the death of another person until his own death, and such other person predeceases him. This is a clarifying change and does not represent new matter.

"(3) The insertion of the words 'the right to income' in place of the words 'the income' is designed to reach a case where decedent had the right to the income, though he did not actually receive it. This is also a clarifying change.

"(4) The insertion of the words 'either alone or in conjunction with any person' is to reach a case where decedent had a right, with the concurrence of another person or persons, to designate those who should possess or enjoy the property or the income therefrom (Senate Finance Committee Report on Revenue Bill of 1932."

The section as amended remained in effect under the 1934 Act. After full consideration Congress has not made any attempt specifically to include within the language of section 302 (c) a transfer where the only interest retained by the grantor is a possibility that the trust property may revert to him upon the happening of an event over which he has no control.

Doubts Resolved in Favor of Taxpayer.

The question here presented is not whether Congress has power under the Constitution to tax transfers containing a provision of the type involved, but whether under a proper construction of the law Congress intended to make taxable an irrevocable transfer made by a decedent

during his lifetime in which he parted with all beneficial interest in the property as one intended to take effect in possession or enjoyment at or after the grantor's death, simply because upon the happening of a contingency over which the grantor has no control the property might revert to the grantor. Unless the Court can say that there is no doubt that Congress did so intend the opinion of the Circuit Court of Appeals should be affirmed.

Gould v. Gould, 245 U. S. 151, l. c. 153:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen."

U. S. v. Merriam, 263 U. S. 179, l. c. 187:

> "On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer."

To the same effect are:

Crocker v. Malley, 249 U. S. 223, l. c. 233;
United States v. Field, 255 U. S. 257, l. c. 262;
Smietanka v. First Trust & Savings Bank, 251 U. S. 602, 606;
Shawb v. Doyle, 258 U. S. 529, 534;
Rienecke v. Northern Trust Co., supra.

Conclusion.

In conclusion, we respectfully submit that the decisions of this Court in McCormick v. Burnet, and May v. Heiner, required that the Circuit Court of Appeals decide this case in favor of respondent for the reasons set forth in the opinion of that Court, as follows (R. 137):

> "It seems, then, that the question as to whether the transfer was one to take effect in possession or enjoyment at or after Mr. Guy's death depends entirely upon whether by the trust instruments he, as an individual, parted with every vestige of control over the beneficial enjoyment and possession of the property conveyed. In order to sustain the conclusion of the lower court that he, as an individual, retained some vestige of control over the beneficial enjoyment and possession of the trust property until his death, we would be obliged to point out what it was he retained. It is clear that the legal title to the trust property passed from him upon the execution of the trust instruments. The possession of the trust property which he had formerly held as an individual he thereafter held as a trustee. The income from the trust property was no longer his. He was obliged either to pay the income over to the beneficiaries or to accumulate it for them. The powers with which he clothed himself as trustee were not to be exercised by him for his own benefit, but only for the benefit of those for whom he had constituted himself trustee. The only interest, then, which he retained was the right to have the trust property revert to him in case the beneficiaries should predecease him. That right to the reversion was not an interest which passed to the beneficiaries as the result of Mr. Guy's death. It was merely an interest which was obliterated by his death. It passed not to the living, but entirely out of existence. So far as we can discern, the rights of the

beneficiaries of the trust property were complete at the time the declarations of trust were executed. Thereafter Mr. Guy, as an individual, had no interest in the property then or thereafter held by him as trustee, except the right to a reversion on certain conditions over which he had no control. Hence, nothing could have passed from him to the beneficiaries of the trust at the time of his death, although that event, by virtue of the terms of the declarations of trust, gave them the rights with respect to his property which the declarations of trust provided they should have if they survived him."

Respectfully submitted,

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